

K Magathevan v Shafie bin Hj Kassim

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HIGH COURT (KUALA LUMPUR) — SUIT NO S2-23-83 OF 1998
KAMALANATHAN RATNAM J
25 APRIL 2001

Tort — *Defamation* — *Letter to regulatory authorities* — *Allegation that plaintiff caused substantial loss to defendant in securities trading* — *Recovery action filed against defendant, whether defendant's complaints intended to stall recovery action against him* — *Proof of malice would defeat qualified privilege* — *Whether defendant's complaints connote defamatory meaning as pleaded*

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The plaintiff was at all material times the operation manager of Lion Commodities & Futures Trading Sdn Bhd ('Lion'). The defendant was at all material times a client/customer of Lion. The defendant was introduced to Lion by the Futures Broker Representative ('FBR'), a commission agent of Lion. In a letter dated 2 October 1998 sent to the Executive Director of Lion, the defendant wrote and published of the plaintiff concerning his conduct in his employment as the operation manager which had caused substantial losses to the defendant. The defendant also sent copies of the said letter to the Chairman of Lion and to the Chairman of the Securities Commission of Malaysia. The plaintiff claimed that in their natural and ordinary meaning, the words contained in the letter meant and were understood to mean that the plaintiff made decisions and carried out trading transactions without the defendant's knowledge and consent, that the losses suffered by the defendant were caused by the plaintiff, that the plaintiff misled the defendant and also misled or lied to the management and that the plaintiff cheated the FBR of his commission. The plaintiff contended that by sending copies of the letter to the various chairmen the defendant was motivated by malice. It was the plaintiff's case that he had been seriously injured in his character and reputation and had suffered damage. The plaintiff thus claimed both general and aggravated damages for libel. The defendant pleaded the defence of qualified privilege. He also pleaded that the complaints or allegations against the plaintiff were correct, accurate and true in substance and in fact. It was not in dispute that the transactions were done in 1997, ie more than 12 months before the letter was sent. The defendant had accepted the losses then. It was also a fact that the defendant wrote and published the letter in October 1998 after Lion had instituted legal proceedings against the defendant.

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Held, allowing the plaintiff's claim:

- (1) The plaintiff's evidence was given in a forthright and clear manner. There was no attempt at prevarication. The defendant, on the other hand, was not telling the truth. He never protested when he received the various statements. In spite of being told by

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- A the FBR that the plaintiff had messed up his accounts he waited until Lion actually sued him before sending the impugned letter. The court was satisfied that the defendant was clearly motivated by malice when he wrote the impugned letter and when he sent copies of same to the various chairmen. Evidence had
- B been led to show that even after sustaining losses the defendant had been updating his account by payment through cheques (see p 95F–G).
- (2) It was clear that Lion had kept the defendant informed of every stage of the transactions. It was also clear that the defendant had ample opportunities to dispute any wrongful transaction. With all
- C material and relevant evidence, the court accepted the plaintiff's submission that the defendant was solely motivated by malice when he wrote the letter. Clearly it was a way out of his predicament. By accusing the plaintiff of wrong doings and by extending copies of the letter to the relevant regulatory
- D authorities, the defendant intended to stall for time and stop the recovery action filed against him. There was no room here for the defendant's defence of qualified privilege (see p 96A, E–F).
- (3) It is trite that proof of malice defeats the defence of qualified privilege even assuming that it is available to the defendant. Whilst the legitimate complaint to Lion of any wrong doing by its
- E employees of matters where the defendant had an interest will come under qualified privilege accorded by common law, in this case there had been absolutely no wrong doing by any employee of Lion including the plaintiff. The complaint of the defendant was ill-founded and connote the defamatory meaning as pleaded by the plaintiff (see p 96G–H).
- F (4) Having considered all aspect, in particular the plaintiff's position and standing, the nature of the libel, the extent of the publication and also the refusal of an apology, the court awarded the plaintiff a sum of RM75,000 as general damages and a further sum of
- G RM75,000 as aggravated damages (see p 97D–E).

[Bahasa Malaysia summary]

- H Plaintiff, pada semua waktu material, merupakan pengurus operasi Lion Commodities & Futures Trading Sdn Bhd ('Lion'). Defendan, pada semua waktu material, merupakan seorang klien/pelanggan Lion. Defendan diperkenalkan kepada Lion oleh seorang wakil broker Futures ('FBR'), yang juga agen komisen Lion. Dalam satu surat bertarikh 2 Oktober 1998 yang dikirim kepada Pengarah Eksekutif Lion, defendan menulis dan menerbitkan tentang kelakuan plaintif sebagai seorang pengurus operasi yang telah mengakibatkan kerugian yang besar kepada defendan. Defendan juga menghantar salinan surat tersebut kepada Pengerusi Lion dan Pengerusi Suruhanjaya Sekuriti Malaysia. Plaintif menuntut bahawa dalam maksud semulajadi dan
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biasa kata-kata yang terkandung dalam surat tersebut, ia difahamkan bahawa plaintiff membuat keputusan dan menjalankan urusan perdagangan tanpa pengetahuan dan kebenaran defendan, bahawa kerugian yang menimpa defendan disebabkan oleh plaintiff, bahawa plaintiff mengelirukan defendan dan juga mengelirukan atau menipu pihak pengurusan dan bahawa plaintiff menipu FBR dari mendapatkan komisennya. Plaintiff berhujah bahawa dengan menghantar salinan surat tersebut kepada pengerusi-pengerusi tersebut, defendan berniat jahat. Adalah hujahan plaintiff bahawa perwatakan dan reputasi beliau telah terjejas dan beliau telah mengalami kerugian. Oleh itu, plaintiff menuntut ganti rugi am dan khas untuk fitnah bertulis. Defendan menggunakan pembelaan perlindungan bersyarat. Beliau juga menuntut bahawa aduan dan dakwaan terhadap plaintiff adalah betul, tepat dan benar dalam isi halnya dan dalam faktanya. Adalah tidak dipertikaikan bahawa urusan-urusan tersebut berlaku pada tahun 1997, iaitu lebih dari 12 bulan sebelum surat tersebut disampaikan. Defendan telah menerima kerugian tersebut pada masa itu. Adalah juga satu fakta bahawa defendan menulis dan menerbitkan surat tersebut pada bulan Oktober 1998 selepas Lion telah memulakan tindakan undang-undang terhadap defendan.

Diputuskan, membenarkan tuntutan plaintiff:

- (1) Keterangan plaintiff diberi secara terus terang dan jelas. Beliau tidak cuba mereka cerita. Manakala defendan pula tidak bercakap benar. Beliau tidak membantah apabila menerima pernyataan-pernyataan tersebut. Walaupun diberitahu FBR bahawa plaintiff telah menyebabkan akaun-akaunnya kelim-kabut, beliau menunggu sehingga Lion mendakwanya sebelum menghantar surat yang dipersoalkan itu. Mahkamah berpuas hati bahawa defendan didorong niat jahat apabila menulis surat yang dipersoalkan itu dan apabila beliau menghantar salinan surat tersebut kepada pengerusi-pengerusi tersebut. Keterangan menunjukkan bahawa walaupun selepas mengalami kerugian, defendan telah mengemaskinikan akaunnya melalui bayaran cek (lihat ms 95F-G).
- (2) Jelas bahawa Lion telah memaklumkan defendan mengenai setiap peringkat urusan. Juga jelas bahawa defendan mempunyai banyak peluang mempertikaikan apa-apa urusan yang salah. Dengan semua keterangan yang material dan relevan, mahkamah menerima hujahan plaintiff bahawa defendan hanya didorong niat jahat semata-mata apabila beliau menulis surat tersebut. Jelas ini merupakan satu cara defendan menyelesaikan masalahnya. Dengan menyalahkan plaintiff atas kesilapan yang dilakukan dan dengan menghantar salinan surat tersebut kepada pihak berkuasa yang relevan, defendan berniat melengahkan dan menghentikan tindakan mendapatkan balik yang difailkan terhadapnya. Tiada

- A ruang di sini bagi defendan menggunakan pembelaan perlindungan bersyarat (lihat ms 96A, E–F).
- (3) Adalah difahami semua bahawa bukti niat jahat mengalahkan pembelaan perlindungan bersyarat walaupun jika pembelaan ini dianggap terbuka kepada defendan. Aduan sah kepada Lion mengenai apa-apa salah laku pekerja mengenai perkara di mana defendan mempunyai kepentingan akan diliputi perlindungan bersyarat yang diberi oleh undang-undang duluan, akan tetapi, dalam kes ini, terdapat tiada salah laku oleh mana-mana pekerja Lion termasuk plaintif. Aduan defendan tidak berasas dan menunjukkan maksud fitnah seperti yang didakwa plaintif (lihat ms 96G–H).
- C (4) Setelah mempertimbangkan semua aspek, terutamanya kedudukan dan status plaintif, jenis fitnah, tahap penerbitan dan keengganan defendan meminta maaf, mahkamah memberikan plaintif jumlah RM75,000 sebagai gantirugi am dan jumlah tambahan RM75,000 sebagai gantirugi khas (lihat ms 97D–E).
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Notes

- E For cases on defamation generally, see 12 *Mallal's Digest* (4th Ed, 2000 Reissue) paras 193–409.

Cases referred to

- Abdul Karim bin Ayob v Kumpulan Karangkrak Sdn Bhd & Ors* [2000] 1 MLJ 243 (refd)
- F *Normala Samsuddin v Keluarga Communications Sdn Bhd* [1999] 2 MLJ 654 (refd)

S Periasamy (M Kumar with him) (Radzi Sheikh Ahmad & Peri) for the plaintiff.

- G *Azhar Azizan Harun (RN Sivaraja with him) (Hashim Sobri & Kadir)* for the defendant.

Kamalanathan Ratnam J:*Facts*

- H The plaintiff was at all material times the Operations Manager of Lion Commodities & Futures Trading Sdn Bhd ('Lion') until 15 April 1999 when Lion ceased operations and the entire staff, including the plaintiff was retrenched. The defendant was at all material times a client/customer of Lion whose account number was RAM 007. The defendant was introduced to Lion by one Domythal Surya Kumar, the Futures Broker Representative ('FBR'), a commission agent of Lion whose commission was based on the trading transactions conducted by the clients whom he
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introduced. In a typewritten letter dated 2 October 1998 and signed by him and sent through the post to the Executive Director of Lion, the defendant wrote and published of the plaintiff and of him in the way of his said occupation and employment and in relation to his conduct therein the following:

Executive Director
Lion Commodities and Futures
Suite 08.01, Level 8
Menara Lion
165, Jalan Ampang
50450 Kuala Lumpur

2 October 1998

Aduan Rasmi terhadap Trading untuk Akaun RAM 007

Dengan ini saya ingin membuat aduan tentang kesilapan terhadap pekerja syarikat tuan iaitu pengurus operasi (En Magathevan) yang telah melibatkan diri secara tidak langsung di dalam trading akaun RAM 007.

Penglibatan beliau telah menyebabkan overloss sebanyak RM180,000. Saya telah diberitahu oleh FBR saya mengenai kejadian yang sebenarnya berlaku yang menyebabkan overloss terjadi.

Saya telah memberi arahan kepada FBR untuk memegang posisi beli dalam Market. Atas berita-berita dan analisa Market yang telah disampaikan oleh FBR saya, arahan telah diluluskan.

Kemudian, pengurus operasi telah diberitahu mengenai kedudukan sebenarnya bahawa posisi beli tidak melanggar peraturan-peraturan yang telah ditetapkan oleh syarikat tuan iaitu 75%.

Dalam pada itu, FBR saya memberitahu saya tentang harga Market akan naik iaitu 1220. Saya juga difahamkan bahawa FBR, telah memberitahu pengurus operasi mengenai harga yang telah dianalisa sebelum Market dibuka. Beliau memberitahu FBR saya dalam Bahasa Inggeris 'Don't f*** around', lalu apabila Market dibuka dia telah melakukan trading atas kebebasan sendiri tanpa memberitahu FBR saya dan tanpa kebenaran saya.

Kebebasannya telah menyebabkan semua posisi beli dikeluarkan atas keuntungan yang kecil. Sejurus selepas itu, sebelum Market ditutup, beliau telah mengambil posisi baru iaitu jual dalam Market.

Atas tindakan inilah, akaun RAM 007 mempunyai deficit kerana pada hari berikutnya, harga Market melonjak 14 mata daripada harga tutup, iaitu 1221 kepada 1235. Saya juga ingin membuat penjelasan mengenai cek yang dikeluarkan sebanyak RM120,000 untuk menimbang ekuiti kepada tidak kurang daripada 75% adalah atas arahan daripada pengurus operasi kepada saya melalui FBR saya. Beliau tahu bahawa cek itu tidak dapat ditunaikan.

Pengurus operasi memberitahu bahawa ia adalah hanya untuk sementara kerana Market akan jatuh semula dan cek ini adalah untuk menyelamatkan posisi-posisi jual yang masih berada di dalam Market.

Beliau juga memberitahu bahawa kemudahan kredit dapat diluluskan dengan memberi collateral yang telah saya sampaikan sebagai bukti iaitu sebanyak 210,000. Akhirnya, posisi dikeluarkan kerana kemudahan kredit dan cek tidak dapat memuaskan syarat-syarat Lion Commodities & Futures Trading Sdn Bhd.

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- A Sejak kebelakangan ini saya berasa serba salah bahawa tuan empunya pekerja telah menyebabkan overloss terjadi; pengaduan saya terhadap pentadbiran syarikat tuan adalah untuk memberitahu perkara sebenarnya yang berlaku dan secara tidak langsung saya yakin bahawa Tuan empunya pekerja tidak memberitahu perkara yang sebenarnya kepada badan pentadbiran yang mana selama ini berasa bahawa saya dan FBR salah dalam situasi overloss ini. Saya juga mengingatkan Badan Pentadbiran ICF untuk menarik balik surat-surat peguam dan datang kepada satu penyelesaian dengan cepat di mana atas nasihat-nasihat pakar dalam bidang industri ini juga menyatakan bahawa ia merupakan kesilapan syarikat tuan sendiri.
- B Saya juga difahamkan bahawa tuan empunya pekerja telah menipu FBR saya dalam commissionnya. Saya harap badan pentadbiran tuan dapat merialisasikan situasi yang sangat mengelirukan terhadap Syarikat Lion Commodities & Futures Trading Sdn Bhd dan organisasi tuan.
- C Sekian sahaja aduan rasmi dan harap pihak pentadbiran dapat membalas surat saya secepat mungkin.
Yang benar,
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(Shafie bin Haji Kassim)
- D Salinan kepada: Chairman, Lion Group of Companies
Chairman, Kuala Lumpur Commodity Exchange
Chairman, Securities Commission of Malaysia

- E The defendant also sent copies of the said letter to the Chairman, Lion Group of Companies, Chairman, Kuala Lumpur Commodity Exchange, and to the Chairman of the Securities Commission of Malaysia, the last two of whom the plaintiff knew as being the supervisory, regulatory and enforcement agencies relating to commodity trading.

Case for the plaintiff

- F The plaintiff's case was that in their natural and ordinary meaning the said words meant and were understood to mean that the plaintiff made decisions and carried out trading transactions without the defendant's knowledge and consent, that the losses were caused by the plaintiff, that the plaintiff misled the defendant and also misled or lied to the management and that the plaintiff cheated the FBR of his commission and/or misappropriated the FBR's commission. Further, by way of innuendo, the said words meant or were understood to mean that the plaintiff was unfit to be the operations manager. The plaintiff contended that by sending copies of the said letter to the various chairmen the defendant was motivated by malice. It was the plaintiff's case that he had been seriously injured in his character and reputation and had suffered damage. The plaintiff thus claimed both
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- H general and aggravated damages for libel, with interest and costs.

The defence

- I The defendant denied that the said words in the said letter bore or were understood to bear any meaning defamatory of the plaintiff. It was the defendant's case that the plaintiff indeed made decisions and carried out trading transactions without the defendant's knowledge and consent, that

the losses were caused by the plaintiff and that the plaintiff misled the defendant. The defendant pleaded that the said letter was prepared by his FBR and that he inadvertently signed the same without deleting the words 'tuan empunya pekerja telah menipu FBR saya dalam commissionnya' in the said letter. However, by his letter dated 3 November 1998 and addressed to the plaintiff, the defendant apologized for the said sentence and tendered an unreserved apology to the plaintiff which the plaintiff had refused to accept. The defendant's case was that his complaints or allegations against the plaintiff were in respect of the negligent mismanagement of the defendant's business by the plaintiff without the consent of the defendant or his FBR and contrary to ss 49 and 53 of the Futures Trading Act 1993 resulting in a loss of RM178,159.55 for which the defendant was sued by Lion at the Kuala Lumpur Sessions Court. In any case, the defence was qualified privilege. The defendant also pleaded that the complaints or allegations against the plaintiff were correct, accurate and true in substance and in fact.

Findings of the court

It is not in dispute that the transactions were done in 1997, that is, more than 12 months before the said letter was sent. The defendant had accepted the losses then. It is also a fact that the defendant wrote and published the said letter in October 1998 after Lion, the plaintiff's employer, had instituted legal proceedings against the defendant to recover the sum of RM178,159.55 in the Kuala Lumpur Sessions Court. It is also in evidence that after accepting the losses, the defendant applied for time to settle the amount due and also pleaded for credit facilities to enable him to resume trading, requests which Lion refused.

The plaintiff led evidence that the last transaction carried out on behalf of the defendant was on 20 August 1997, because by July and August 1997 his account was in deficit and was on call margin which he did not meet. It was on account of this that his trading positions were liquidated in September 1997. Before his trading positions were liquidated, the plaintiff spoke to the defendant over the telephone and there was also correspondence exchanged. The defendant sent a post-dated cheque for RM120,000 dated 10 September 1997 by way of a letter dated 3 September 1997. The defendant asked that the said cheque be held as security and to be banked in when advised by the defendant. The plaintiff faxed a reply dated 17 September 1997 informing the defendant that if his deficit was not covered within the stipulated period, Lion would liquidate. Since no payment was received by the defendant, 37 lots of the defendant were liquidated on 17 September 1997 and the remaining lots liquidated on 18 September 1997. The plaintiff also kept the FBR informed of this. The instructions to liquidate were given by the plaintiff's boss and the plaintiff carried out the said instructions. The defendant was informed of the liquidation by way of a letter and the statement of account showing a balance of RM170,302.50. The defendant then wrote to Lion on

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- A 14 October 1997 making more proposals and requested that he be allowed to continue to trade. Refusing the defendant's request, Lion sent a legal notice some time in April 1998 to recover the balance due. In response to that notice, the defendant met the plaintiff and pleaded with the plaintiff to persuade Lion not to take legal action and that he would settle the outstanding balance by installments and sought the plaintiff's assistance to be allowed to continue trading. The plaintiff informed the defendant that he had no power to make such a decision as to allow him to continue trading. However, he advised the plaintiff to submit his proposals in writing for Lion's consideration. The plaintiff also led evidence that the defendant enquired from him if he would testify in favour of Lion if Lion proceeded with its legal action against him. To this, the plaintiff said he answered in the affirmative. Since there was no further response from the defendant, Lion proceeded to file the summons for recovery at the Kuala Lumpur Sessions Court. Soon after the service of the summons on the defendant, one Syed Sabeer Ali ('Syed'), the Compliance Officer in Lion, showed the plaintiff the impugned letter. Syed informed the plaintiff that Lion had instructed him to investigate the contents of the said letter. The plaintiff was interrogated and questioned by Syed on the allegations contained in that letter. The plaintiff told the court that he felt humiliated and distressed. Soon after the investigations, he received a memo on 7 October 1998 from his boss excluding him from central buying activities. He was even more perturbed when he found out that the Kuala Lumpur Commodity Exchange had sent a letter dated 2 November 1998 to his boss to investigate the allegations contained in the impugned letter and to forward to the Exchange, a written explanation. The plaintiff confirmed that the defendant was always kept informed of all transactions and the status of his accounts from the first transaction on 30 August 1996 until the liquidation in September 1997. The plaintiff also testified that all relevant statements including the Daily Trade Confirmation, Open Position Statement, Monthly Trade Confirmation and Monthly Financial Statement were not only sent to the defendant but also to the defendant's FBR and that neither the defendant nor the FBR ever complained in respect of, nor disputed any of, the statements sent. The defendant also never disputed his liability to meet the margin calls when notices requiring him to do so were sent to him. Not only did he not dispute them, he acknowledged and responded by sending a post-dated cheque. The plaintiff explained the occasion when he acted for the defendant. This was in September 1996 when the defendant's FBR left for India on 1 September 1996 for two weeks and requested that the plaintiff look after the defendant's account and to contact the defendant directly for anything during the FBR's absence. During this period, the defendant too would telephone him with instructions and seek his opinion and would then give him instructions which the plaintiff would then carry out. Throughout this period, the defendant made a net gain of RM730. When the FBR returned, he took over the defendant's accounts and the plaintiff stopped giving any opinions to the defendant nor did he carry out any transactions for the defendant. The plaintiff denied the allegations contained in the impugned letter that he was responsible for the defendant's

losses. The plaintiff confirmed that he had been cleared by the management of any wrongdoing, and that to vindicate himself he had filed these proceedings. As for the non-payment of the FBR's commission, that was because Lion had held it back. The defendant's statements of accounts show that during the trading period the defendant deposited into his account on 25 October 1996, a sum of RM10,000 to meet the call margin. On 19 November 1996, he withdrew from his account RM10,000 and also on 29 November 1996, he withdrew RM14,108. On 27 February 1997, he deposited a sum of RM20,000 to recommence trading and on 5 May 1997, he deposited RM10,000 to meet the call margin. On 17 June 1997, he deposited RM30,000 to meet the call margin and again on 10 September 1997, he further deposited RM10,000 for the same reason. His trading position was finally liquidated on 18 September 1997, resulting in an overall loss of RM170,302.50.

During the course of the trial, counsel for the defendant confirmed that he was dropping his plea of justification. The defendant's suggestion that the impugned letter was actually a formal complaint about matters raised in the letter was rejected by the plaintiff on the basis that it was motivated by malice. The plaintiff confirmed under cross-examination that he was presently working as an FBR at another Futures trading company since 1999. There were no other witnesses for the plaintiff.

In his examination in chief, the defendant maintained that the FBR explained to him what commodity trading was all about. Prior to that he had not a clue about such trading. His evidence was that the FBR only told him about the profit to be made. He was not explained the risks involved in commodity trading. Since he neither wrote nor spoke English, he did not understand what was stated in the agreement which he was asked to sign prior to commencing trading. He denied ever speaking to the plaintiff nor instructing the plaintiff to deal on his behalf. Only when he received a legal notice from Lion, and followed with the summons claiming the outstanding sum due, did he realize his loss. He then contacted his FBR who told him that the plaintiff had misused his account and had caused the loss. He issued a cheque for RM120,000 in favour of Lion because his FBR told him that by doing so Lion would give him a loan for RM100,000 and that the plaintiff had assured the FBR that he would assist to settle this matter. When finally Lion sued him it was his FBR who drafted the impugned letter and since he did not understand the contents he merely signed it and sent it because he was told by his FBR that it was nothing more than a letter of complaint to Lion regarding its employee, the plaintiff, who had caused him loss in dealing with his account.

Under cross-examination, the defendant admitted that his position was finally liquidated on 18 September 1997 due to non-payment of the outstanding balance. Further, he admitted that whilst the impugned letter was written by the FBR, he understood the contents of the said letter since the FBR had explained to him the contents therein. He had copied the letter to the various chairmen upon the suggestion of the FBR. Although he had retracted that part of the letter that stated that the FBR had been cheated of his commission by the plaintiff, he agreed that he did not send that letter

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- A of retraction to the various chairmen. He denied a suggestion that he wrote the impugned letter against the plaintiff because the latter had refused to help him.

- B When the FBR was called to testify as the defendant's witness, he told the court that he had always assumed that the defendant could understand and speak some English as he had attended school. This witness also testified that had known the defendant since childhood. He testified that he had never traded on his own in respect of the defendant's account number RAM 007. It was always under the instructions of the plaintiff. What is of significance is that he admitted having drafted the impugned letter which he faxed to the defendant. The defendant then made corrections to the said letter before signing it and posting it to the parties concerned. Under cross-examination the witness was referred to the risk disclosure statement which the defendant had signed together with the application form to trade with Lion. He also admitted that he had advised the defendant of the risks involved.

- D From the evidence so far adduced it is clear to me, notwithstanding the defendant's protestations of his inability to speak or understand English, that he could speak and understand English. His own key witness, who is his childhood friend, said so. Besides, the law on this is clear. He had signed the application form and had agreed to be bound by the terms and conditions stipulated by Lion, before Lion accepted him as a client. The defence rested its case solely on the Common Law defence of qualified privilege. Can the defendant avail himself of this defence? It must be noted that the impugned letter was sent long after the defendant's position had been liquidated by Lion because of the defendant's inability to pay the margin call as requested. The defendant met the plaintiff in July 1998. I accept the plaintiff's explanation as to why the meeting took place. I watched both the plaintiff and defendant testify. The plaintiff's evidence was given in a forthright and clear manner. There was no attempt at prevarication. The defendant, on the other hand, was not telling the truth. He totally denied any knowledge of the English language. Yet his own childhood friend said otherwise. He never protested when he received the various statements. In spite of being told by the FBR that the plaintiff had messed up his accounts, he waited until Lion actually sued him before sending the impugned letter. I am satisfied that the defendant was clearly motivated by malice when he wrote the impugned letter and when he sent copies of same to the various chairmen. Evidence has been led to show that even after sustaining losses, the defendant had been updating his account by payment through cheques.

- H On 27 February 1997, he deposited RM20,000 into his account.

On 5 May 1997, he deposited RM10,000 into his account.

On 17 June 1997, he deposited RM30,000 into his account.

- I On 10 September 1997, he deposited RM10,000 into his account.

Even after liquidation on 2 January 1998, he paid RM5,000 to Lion. The defendant also never denied nor disputed the statements. He also did

not allege that he did not receive them. It is clear therefore that Lion had indeed kept the defendant informed of every stage of the transactions. Whenever there was a requirement for a topping up, a letter was sent to his address in the agreement, and he had responded by complying. It is also clear that the defendant had ample opportunities to dispute any wrongful transaction. Further, the defendant did not challenge the plaintiff in cross-examination that when the defendant's FBR left for India, it was the plaintiff who had traded for the defendant upon the request of the FBR and that even the defendant had spoken to him. But what was most damaging to the defendant's case was his admission of liability by giving a post-dated cheque. I reject the defendant's explanation for giving the said cheque. Why would Lion accept a post-dated cheque for RM120,000 from the defendant and give a loan of RM100,000 to him to settle an outstanding debt of over RM170,000 owed to it by the defendant? It does not make sense. The defendant's letter dated 3 September 1997 enclosing the post-dated cheque to 10 September 1997 does not contain the explanation he gave to court. In that letter, he merely requests the trading company to only bank in the cheque when he informs them to do so. On 15 September 1997, the company wrote to the defendant informing that if they did not hear from him they would bank in the cheque. This letter was signed by the plaintiff as the operations manager. In reply, the defendant's letter dated 17 September 1997 pleaded for time and to accord him credit facilities to enable him to trade, and he even stated that he was coming into a lot of money from contract works he had done. The company however gave him, by its faxed note dated 17 September 1997, one hour to settle the outstanding balance. The defendant then replied offering his property as collateral. With all these material and relevant evidence before me, I cannot but accept the plaintiff's submission that the defendant was solely motivated by malice when he wrote this letter. Clearly it was a way out of his predicament. By accusing the plaintiff of wrong doings and by extending copies of the said letter to the relevant regulatory authorities, the defendant intended to stall for time and stop the recovery action filed against him. There is no room here for the defendant's defence of qualified privilege. I accept the meaning given by the plaintiff to the words used by the defendant in respect of the impugned letter in both their natural meanings and also on the innuendoes. It is trite that proof of malice defeats the defence of qualified privilege even assuming that it is available to the defendant. Whilst the legitimate complaint to Lion of any wrong doing by its employees of matters where the defendant had an interest will come under qualified privilege accorded by Common Law, in this case there has been absolutely no wrong doing by any employee of Lion, including the plaintiff. The complaint of the defendant, even assuming it is such, is ill-founded and connotes the defamatory meaning as pleaded by the plaintiff. I have no hesitation in finding for the plaintiff.

Damages

In *Normala Samsuddin v Keluarga Communications Sdn Bhd* [1999] 2 MLJ 654 and in *Abdul Karim bin Ayob v Kumpulan Karangraf Sdn Bhd & Ors*

- A [2000] 1 MLJ 243, I awarded RM100,000 as damages and in *Normala Samsuddin*, a further sum of RM100,000 as aggravated damages. In awarding damages in this case, I must consider the fact that being in such a responsible position, the plaintiff was ordered to stop trading. I find that such an order was made because of the defendant's complaint. In the trading business, the plaintiff's reputation is most important. An accusation
- B that the plaintiff was trading without the client's consent would obviously cause a slur upon the plaintiff's reputation. He would no doubt be shunned by clients as someone not to be trusted. Whilst it is a fact that he has been cleared, the fact remains that he was unjustly subjected to the ignominy of an enquiry and an investigation, unnecessarily due to the machinations of a
- C mischievous client who had his own personal agenda to fulfil and that it did not matter to him whose feelings he would trammel. I take into consideration the plaintiff's position and standing, the nature of the libel, the extent of the publication and also the refusal of an apology. I cannot imagine the mental distress, hurt, anxiety and anguish the plaintiff and his
- D family would have undergone during this period of investigation. Although the plaintiff has been retrenched, I have not taken this aspect into consideration in awarding damages because all employees of Lion had been retrenched due to bad times.

- E Having considered all aspects, I am of the view that the defendant must be made to realize that he cannot vent his frustrations on any innocent person for the hard times he had to encounter through his own desire to make a quick buck on commodity trading. I therefore award the plaintiff a sum of RM75,000 as general damages and a further sum of RM75,000 as aggravated damages. Even to the date of the hearing, the defendant had not tendered an apology. There will be interest on both the awards from the date of the impugned letter, that is, 2 October 1998 to date hereof at the
- F rate of 4%pa. The plaintiff will also have his costs.

Plaintiff's claim allowed.

Reported by Jafisah Jaafar

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